

Mr. Diamond

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-203283

DATE: July 7, 1981

MATTER OF: Teresa Deems - Backpay

DIGEST: Federal Aviation Administration employee was terminated and subsequently reinstated. Employee's [claim for backpay] during period she was unemployed is disallowed since there has been no finding by an appropriate authority that the termination action was unjustified or unwarranted. 5 U.S.C. 5596 (1976).

This action is in response to a request dated May 1, 1981, by Kenneth Huston, Professional Air Traffic Controllers Organization, concerning Ms. Teresa Deems' entitlement to backpay. A decision is being rendered pursuant to 4 C.F.R. Part 21 (1980). As amended August 21, 1980, Part 21 contains the provisions under which this Office settles issues on the legality of appropriated fund expenditures that arise in the Federal Labor-Management Relations program. See 45 F.R. 55689.

The issue concerns Ms. Deems' entitlement to backpay pursuant to the Back Pay Act of 1966, 5 U.S.C. 5596 (1976), for the 2-month period following her termination of employment with the Federal Aviation Administration (Administration) until the time of her reinstatement. For the following reasons, Ms. Deems is not entitled to backpay.

Ms. Deems was hired by the Federal Aviation Administration as an Air Traffic Control Specialist, on February 24, 1980. On March 11, 1980, she entered the Administration's Aeronautical Training Center as a student in the National Terminal Air Traffic Training Program. Successful completion of this course is a mandatory requirement for retention as an Air Traffic Control Specialist. Ms. Deems failed Phase IV of the training program. Consequently, approximately 2 weeks later (June 28, 1980), her employment was terminated.

Just prior to her termination, Ms. Deems prepared a statement in which she contends that while attending the program, certain collateral incidents interfered

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with her ability to participate in the training. Because of this she requested reinstatement in the training program.

Ms. Deems was subsequently reinstated on September 2, 1980, as recommended in a letter by the Director, Aeronautical Center. In that letter, the Director states that the collateral incidents were not exactly as Ms. Deems related. He states that the Administration's records did not reveal any adverse impact on Ms. Deems at the time the incidents occurred. However, Ms. Deems did bring the matter to her lead instructor's attention, who did not precisely follow Academy procedures since there was no indication that this was affecting Ms. Deems' performance, nor did Ms. Deems claim any adverse impact. As a result, reinstatement was recommended to assure that Ms. Deems was treated fairly and equitably.

Subsequent to her reinstatement, Ms. Deems was informed that she was not entitled to backpay for the 2-month period she was unemployed. She demanded her full salary for that period but was informed by the Administration's Chief, Personnel Management Division, that proper action to terminate employment was taken since Ms. Deems failed a training program during her probationary period.

The matter was grieved pursuant to the collective-bargaining agreement but the grievance was denied because the negotiated grievance procedure precludes grievability on an issue concerning termination of a probationary employee. For the same reason, the Merit Systems Protection Board declined jurisdiction over Ms. Deems' appeal.

The claim for backpay is based on Ms. Deems' allegation that the Administration's termination action was unwarranted or unjustified. Furthermore, Ms. Deems contends that "but for" the Administration's wrongful action, i.e., the fact that her lead instructor did not precisely follow procedures when Ms. Deems brought the situation to his attention, she would not have been terminated.

Entitlement to backpay is governed by 5 U.S.C. 5596(b) (1976) which provides in pertinent part:

"(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination * * * is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

"(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

"(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period * * *."

Thus, in order to recover backpay there must be a finding by appropriate authority that an employee has been affected by an unjustified or unwarranted personnel action. "Appropriate authority" is defined by Office of Personnel Management regulations to include the head of the employing agency or an agency official to whom corrective action authority is delegated, the Merit Systems Protection Board, and the Comptroller General. 5 C.F.R. 550.803(d) (1980).

There is no statement in the record by an appropriate authority that Ms. Deems' reinstatement was based upon a finding that the Administration's termination action was unjustified or unwarranted. On the contrary, the evidence supports the Administration's decision in view of the fact that Ms. Deems failed a mandatory training program during her probationary

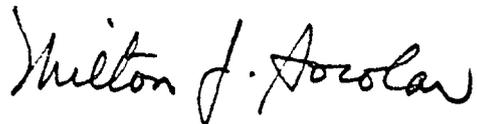
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period. The fact that she was subsequently reinstated does not, in and of itself, constitute a determination that her removal was unjustified or unwarranted.
B-161149, April 25, 1967.

The recommendation by the Director, Aeronautical Center, for Ms. Deems' reinstatement recognized that, upon further inquiries, Ms. Deems had brought the situation to the attention of her lead instructor who did not follow Academy procedures. But the Director stated that this was because there was no indication that the situation was having an adverse impact upon Ms. Deems, nor did Ms. Deems claim that there was at that time. Thus, the Director did not make a finding that her removal was unjustified or unwarranted. He found that there were circumstances which would warrant her reinstatement.

Therefore, in the absence of a finding by the appropriate authority that Ms. Deems' termination was unjustified or unwarranted, she is not entitled to backpay. The Administration has not made such a finding and since its actions were reasonable based on the evidence of record such a finding cannot be made by this Office.

Accordingly, Ms. Deems' claim for backpay is disallowed.



Acting Comptroller General
of the United States